92-668

Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

Number ____

SUPREME COURT OF THE UNITED S'

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORA'

Debtor,

SUZAN BREWER,

Plaintiff-appellee,

vs

ERWIN & ERWIN, Professional Corpo

Defendant-appellant

APPENDIX TO PETITION FOR CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

VOLUME II

Warde H. Erwin
Counsel of Record for Defendant-a

Address: 2110 SW Jefferson Street
Suite 100
Portland, Oregon 97201
Phone (503 226 4525

Charles C. Erwin
Additional Counsel
Address: 2110 SW Jefferson Street
Portland, Oregon 97201
Phone (503) 226 4525

Number _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,)
)
Debtor,)
)

)
SUZAN BREWER,)
)
Plaintiff-appellee,)
)
vs.)
)
ERWIN & ERWIN, Professional Corporation,)
)
Defendant-appellant.)
)

CIVIL MINUTES U. S. DISTRICT COURT

BANKRUPTCY APPEAL, AND DISTRICT

COURT DOCKET ENTRIES

JUNE 1, 1988 TO APRIL 23, 1990

Warde H. Erwin
Counsel of Record for Defendant-appellant

Address: 2110 SW Jefferson Street
Portland, Oregon 97201

Charles C. Erwin
Additional Counsel
Address: 2110 SW Jefferson Street
Portland, Oregon 97201

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TO

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CIVIL MINUTES GENERAL

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4.	Entries 2-14-90 to 4-23-90	163 to 166

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

CIVIL MINUTES - GENERAL

Case No. Bkcy #383-01488-H-11;

(Adv. #895-0131) Date June 1, 1988

Title In re: Marquam Investment; John Franzwa, Inc. v. Lavelle Mullennex, et al

DOCKET ENTRY

Record of hearing,

ORDERED that appellant's motion to sever is GRANTED. Further, the brief on appeal concerning Larry Erwin's fee is due 6/22/88, the response 7/2/88 and reply is due 8/5/88. The appellant is to confer with counsel and submit a proposed order concerning future scheduling. Finally, appellant is to file the required transcript by July 1, 1988.

PRESENT:

HON. JAMES A. REDDEN, JUDGE

Craig Meyer	Jerry Harris
Deputy Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Charles Robinowitz	Charles Erwin
	Larry Erwin

Proceedings:

ntfd

cc

Chambers (BH)

MINUTES FORM 11 — Initials of Deputy Clerk

BANKRUPTCY PROCEEDING RECORD

DATE	NR	
06/01/88	(20)	Rcd of hearing, ORDERED that appellant's motion to sever is GRANTED. Further, the brief on the appeal concerning Larry Erwin's fee is due 6/22/88, the response 7/22/88 and the reply is due 8/5/88. The appellant is to confer with counsel and submit a proposed order concerning future scheduling. Finally, appellant is to file the required transcript by July 1, 1988. ntfd
06/22/88	(21)	APPELLANT'S BRIEF
06/22/88	(22)	EXCERPT OF RECORD
07/08/88	(23)	Rec of ord: Attorney Charles Robinowitz's

		request for an extension of time to July 21, 1988 to file the transcript of the May 6-7, 1985 hearing is GRANTED ntfd
07/25/88	(24)	APPELLEE'S BRIEF
07/28/88	(25)	Rcd of ord: Pursuant to Mr. Charles Robinowitz's request, an additional two weeks,until August 4, 1988, to file the transcript. ntfd
08/05/88	(26)	APPELLANTS' REPLY BRIEF
AUGUST	27)	ORDER - This case is ASSIGNED TO JUDGE OWEN M. PANNER. nb CNSL/PA

10/13/88	28	OPINION PANNER (re: Bankruptcy court's award of travel expenses to law firm of Babb, Avedovech & Erwin)

10/13/88 29 ORDER - judgment of the Bankruptcy court is affirmed PANNER

10/13/88 30 JUDGMENT - IT IS ORDERED AND ADJUDGED the decision of the bankrutpcy court is AFFIRMED and this action is dismissed PANNER

Proceedings include all events. TERMED

3:88cv915 John B.Franzwa,Inc., et al. v. Mullennex, et al

8/12/88 31 MOTION by plaintiff Suzan -- Brewer to remand to reconstruct record (w/oa req) (dn) [Entry date 10/31/88]

8/12/88 32 Memorandum of plaintiff Suzan - Brewer in support of motion to remand to reconstruct record (w/oa

		req) [31-1] (dn) [Entry date 10/31/88]
10/13/88	28	Opinion Signed 10/13/88 Honorable Owen M. Panner (jp) [Entry date 10/14/88]
10/13/88	29	ORDER Judgment of Bkcy Crt Affirmed. ntfd Signed 10/13/88 micro-filmed 10/14/88 Honorable Owen M. Panner (jp) [Entry date 10/14/88]
10/17/88	30	JUDGMENT: the decision of the Bankruptcy Court is affirmed & this act is dism. [29-2] [28-1] ntfd, dismissing case Signed 10/17/88 Honorable M. Panner (te) [Entry date 10/18/88]
7/14/89	33	Stipulation and ORDER regarding briefing

schedule: IT IS HEREBY ORDERED that appeallant Suzan Brewer shall file her opening brief in or before 8/1/89, on the issue of Erwin & Erwin's entitlement to attorneys' fees; Erwin & Erwin shall fiel its response on or before 9/12/89; and the appeallant shall file her reply brief on or before 10/3/89 IT IS FURTHER ORDERED that a briefing schedule for all other issues now pending on appeal is deferred pending a decision on Erwin & Erwin's entitlement to attorney's fees. ntfd Signed 7/14/89 microfilmed & entered

		7/18/89 Honorable Owen M. Panner (dn) [Entry date 7/18/89]
8/1/89	34	Appellant's brief. (neal) [Entry date 8/2/89]
8/1/89	35	Appellant Excerpt of Record (neal) [Entry date 8/2/89]
8/28/89	36	Respondent's request for extension of time to file brief. (neal)
8/29/89	37	RECORD OF ORDER: granting respondents request for extension of time (36-1) to an including 9-30-89, to respond ntfd Honorable Owen M. Panner (neal)
9/28/89	38	Respondent's brief filed. (neal)
9/28/89	39	Respondent's excerpt of record- Volume I (neal)

9/28/89 40 Respondent's excerpt of record- Volume II (neal)

9/28/29 41 Respondent's excerpt of record- Volume III (neal)

10/2/89 42 RECORD OF ord granting appellant an ext of time to 10/18/89 to file his reply brief. ntfd Honorable Owen M. Panner (tely [Entry date 10/4/89]

Docket as of April 23, 1990 4:22 pm page2

3:88cv915 John B.Franzwa,Inc., et al v. Mullennex, et al.

Proceedings include all events. TERMED

10/18/89 43 Appellant's reply brief. (neal)

2/14/90 44 RECORD OF ord Case re-assigned to Honorable James A. Redden, ntfd. Honorable Owen M. Panner

		(tely) [Entry date 2/15/90]
3/8/90	45	OPINION The bankruptcy court's orders allowing Erwin & Erwin's claim for atty's fees are reversed. The case is remanded to the bankruptcy court for the entry of an order disallowing Erwin & Erwin's claim for atty's fees in its entirety. Signed 3/8/90 Honorable James A. Redden (clar) [Entry date 3/9/90]
3/8/90	46	ORDER The bankruptcy court's order allowing Erwin & Erwin's claim for atty's fees are reversed. The case is remanded to the bankruptcy court for the entry of an ord

		disallowing Erwin's claim for atty's fees in its entirety. Signed 3/8/90 Honorable James A. Redden (clar) [Entry date 3/9/90]
4/5/90	47	Notice of appeal by defendant Erwin & Erwin, P.C. from Dist. Court ord of 3/8/90 [46-1] (tely) [Entry date 4/6/90]
4/5/90	--	Received C/A fee of $: 100.00 D/C fee of $: 5.00 (Receipt # 88972) (tely) [Entry date 4/6/90]
4/5/90	--	Mailed copy of N/A to cnsal & to US Court of Appeals for the Ninth Circuit along with copy of ord and d/sheet.

		(tely) [Entry date 4/6/90]
4/18/90	48	Designation of record/ trial court file; entire transcript; exhibits (qsdr) [Entry date 4/19/90]
4/19/90	49	Certificate of Record Transmitted to US Court of Appeals for the Ninth Circuit/cnsl copied (qsdr)
4/23/90	--	Clerk's record on appeal transmitted to US Court of Appeals for the Ninth Circuit (tely)

Number_____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,

Debtor.

SUZAN BREWER,

Plaintiff/Appellee,

vs.

ERWIN & ERWIN, P.C.,

Defendant-Appellant.

GENERAL DOCKET

NINTH CIRCUIT COURT OF APPEALS

AS OF AUGUST 25, 1992

Warde H. Erwin
Counsel of Record for Defendant-Appellant
Address: Suite 100
2110 SW Jefferson Street
Portland, Oregon 97201-7702
Phone 503 226 4525

Charles C. Erwin
Additional Counsel
Address: 2110 SW Jefferson Street
Portland, Oregon 97201-7702
Phone 503 226 4525

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GENERAL DOCKET FOR

Ninth Circuit Court of Appeals

Court of Appeals Docket

#: 0-35312 Filed: 4/26/90

Nsuit: 0

Brewer, et al v. Erwin & Erwin, P.C.

Appeal from District of Oregon (Portland)

- -

Case type information:

1) bankruptcy (DC)

2) District court (bkcy by way of

3)

- -

Lower court information

District: 0979-3 : CV-88-915RE

lead: 383-01488

court reporter: Jerry Harris

presiding judge: James A. Redden,

District Judge

Date Filed: 8/10/88

Date order/judment: 3/8/90

Date NOA filed: 4/5/90

PUBLISHER'S NOTE

ORIGINAL PAGINAT

Fee status: paid

- -

Prior cases:

None

Current cases:

None

- -

Panel Assignment:

Panel: ALA WJF CHH :PO 7/11/91 am

Date of decision: **/**/**

- -

Docket as of August 25, 1992 11:25 am

Page 1

Proceedings include all events.

90-35312 Brewer, et al v. Erwin &

Erwin, P.C.

In re: MARQUAM	No Appearance
INVESTMENT CORPORATION	[COR LD NTC ret]
Debtor	No address

ON IS NOT CONTINUOUS.

SUZAN BREWER
Plaintiff-
Appellee

Charles Robinowitz, Esq.
(503) 226-1464
[COR LD NTC ret]
1211 SW Fifth Avenue
2962 Pacwest Center
Portland, OR 97204

v.

ERWIN & ERWIN, P.C.
Defendant-
Appellant

Charles Erwin, Esq.
(503) 226-4525
Ste. 100
[COR LD NTC ret]
2110 SW Jefferson
Portland, OR 97201

Docket as of August 25, 1992 11:24 am

Proceedings include all events.

90-3532 Brewer, et al v. Erwin &
Erwin, P.C.

In re: MARQUAM INVESTMENT CORPORATION
Debtor

SUZAN BREWER

Plaintiff - Appellee

v.

ERWIN & ERWIN, P.C.

Defendant - Appellant

Docket as of August 25, 1992 11:25 am

Proceedings include all events.

90-35312 Brewer, et al v. Erwin & Erwin, P.C.

4/26/90 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement. setting schedule as follows: CADS due 5/10/90 for Charles Erwin; court reporter shall file transcript in DC by 6/5/90 for Jerry Harris; certificate of record shall be filed by

6/12/90; appellant's opening brief is due 7/23/90 for Erwin & Erwin. P.C.; appellees' brief is due 8/21/90 for Suzan Brewer; appellants' reply brief is due 9/4/90 for Erwin & Erwin, P.C.; [90-35312] (dmf)

4/27/90 Filed certified transcript of record on appeal in three Volumes. Vol. 1 Pldgs (copy); Vols. 2 & 3 RTs (originals). (jr)

5/14/90 Filed Charles Erwin Civil Appeals Docketing Statement served on 5/10-90 (to CONFATT) [90-35312] [90-35312] (mt)

5/22/90 Filed certificate of record on appeal RT filed filed in DC none [90-35312] (ra)

6/8/90 Case released from Pre-Briefing Conference program. (tsp)

7/11/90 10 day oral extension by phone

of time to file Appellant brief. [90-35312] appellants' brief due 8/2/90; appellees' brief due 9/4/90' appellants' reply brief due 9/14/90; (ra)

8/2/90 Filed original and 16 copies aplt's opening brief (Informal: no) of 34 pages and five excerpts of record in 3 volumes; served on 8/1/90. [90-35312] (jr)

8/29/90 10 day oral extension by phone of time to file Appellee's brief. [90-35312] appellees' brief due 9/14/90; appellants' reply brief due 9/24/90; (ra)

9/17/90 Filed original and 15 copies appellee Suzan Brewer's 33 pages brief; served on 9/14/90 [90-35312] (dmf)

9/17/90 Received Appellee Suzan Brewer supplemental excerpts of record

PUBLISHER'S NOTE

THE FOLLOWING PAGE IS UNAVAILABLE FOR FILMING

PAGE 175

on appeal in 1 volumes. Copy to ProMo with motion to file oversize excerpts. (dmf)

9/28/90 Filed motion and deputy clerk order :(Deputy Clerk: ahh) Apple's motion to file supplemental excerpts in excess of 50 pages is denied. Apple has indicated in the motion that the documents contained in the supplemental excerpts were the subject of judicial notice in the district court and that a request for judicial notice is contained in apple's brief. Within 14 days of entry of this order, apple shall file an original and four copies of a motion for judicial notice of the above documents. Such motion and any related filings shall be referred to the merits

BEST AVAILABL

moot. The motion was denied on 9/28/90. Aple was instructed to move for judicial notice of the documents in question. Such motion and any related filings will be decided by the merits panel once the appeal has been assigned to a panel for disposition on the merits. The court, on own motion, extends time to file optional reply br, reply brief due 10/19/90. Aplt advised that motions to be submitted in orig + 4 copies, 9th Cir R. 27-1. Subject to recon....[wording edited] (Motion recvd 9/28/90) [90-35312] (mim)

10/15/90 Filed aplee's Request for Judicial Notice for referral to merits panel per order of 9/28/90. Served 10/11/90 *****

E COPY

PUBLISHER'S NOTE

THE FOLLOWING PAGE IS UNAVAILABLE FOR FILMING

PAGE 178

this appeal. Subject to reconsideration. [90-35312] (dmf)

11/5/90 Filed aple's response to request for judicial notice, referred to merits panel per order of 9/28/90. Served 10/25/90. ****** [90-35312] (dmf)

12/12/90 Filed order (Case Management Atty/Deputy Clerk: JN) aplt has not responded to this court's order of 10/23/90. Within 14 days of the entry of this order, the parties shall provide this court with proof that aple timely appealed from the bankruptcy court to the DC. This appeal will not be processed until a response to this order is received. Failure to respond may result in

PUBLISHER'S NOTE

THE FOLLOWING PAGE IS UNAVAILABLE FOR FILMING

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1/6/91 Calendar check performed [90-35312] (aw)

5/7/91 Calendar materials being prepared. [90-35312] [90-35312] (aw)

5/10/91 CALENDARED: PORTLAND July 12, 1991 9:00 am [90-35312] (aw)

6/20/91 Received Charles Erwin for Appellant Erwin & Erwin, P.C. letter dated 6/18 re "it would be helpful to know whether the Panel intends to hear argument upon the motion to consider materials not submitted to the trial court..."(PANEL) [90-35312] (jlc)

6/27/91 Filed order (Deputy Clerk: gb) the parties are ordered to file simultaneous supplementqal letter briefs of not more than 10 pages on or before 7/3/91, discussing the effect, if any,

on this appeal file on 4/4/88, of the DC's subsequent remand to the bankruptcy court of "John B. Franzwa, Inc. v. Erwin & Erwin, P.C. (In re Marquam Investment Corp.)" No. 88-114MA slip op. (D Or. 6/13/88) for a determination of the fair market value of Marquam's lease of office space to Erwin during the relevant time period. Specifically, the parties should discuss whether the remand of this issue rendered moot any of the issues presented in this appeal. (cite) [90-35312] (jlc)

7/2/91 Filed original and 2 copies of Appellant Erwin & Erwin, P.C. supplemental brief of 5 pages, served on 6/28/91 per order of

6/27/91 (PANEL) [90-35312] (mlm)

7/3/91 Filed fax copy Appellee Suzan Brewer supplemental brief of 3 pages, served on 7/3/91 (PANEL via fax) [90-35312] (mlm)

7/11/91 ARGUED AND SUBMITTED to Arthur L. ALARCON, Warren J. FERGUSON, Cynthia H. HALL [90-35312](mlm)

8/26/91 FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Arthur L. ALARCON, author; Warren J. FERGUSON; Cynthia H. HALL.) FILED AND ENTERED JUDGMENT. [90-35312] (ck)

9/9/91 Filed Appellee Suzan Brewer bill of costs, served on 9/6/91 [90-35312] (jlc)

Docket as of August 25, 1992 11:25 am

Proceedings include all events.

90-35312 Brewer, et al v. Erwin & Erwin, P.C.

9/23/91 Filed Suzan Brewer motion to for attorney(s) fees in the amount of $5,058.75; w/supplementeal application form; served on 9/20/91.(placed in drawer pendin opposition) (jlc)

10/3/91 Filed Appellee Sizna Brewer reply regarding request for sanctions; served on 10/8/91. (PANEL) [90-35312] (jlc)

3/24/92 Filed published order & dissent (Arthr L. ALARCON, dissenting, Warren J. FERGUSON, Cynthia H. HALL); granting appellee's motion for attorneys' fees. It is ordered that the amount of $5,058.75 is awarded to the aples against the aplt Erwin &

Erwin, P.C... [90-35312] (jlc)

4/7/92 [2107321] Filed original and 40 copies Appellant Erwin & Erwin, P.C. petition for rehearing with suggestion for rehearing en banc (addressing 3/24/92 order) 15 p.pages, served on 4/6/92.(PANEL & ALL ACTIVE JUDGES [90-35312] (jlc)

4/9/92 Filed Appellant Erwin & Erwin, P.C.'s motion to file excerpts (to accompany en banc petition).(4/7)(PANEL) [90-35312] [90-35312] (jlc)

4/29/92 Rec'd. orig. & 40 addl. authority in support of Erwin & Erwin' motiion in arrest of judgment & recall of mandate. (4/27)(Shelved pending motion to recall the mandate) [90-35312] (jlc)

5/8/92 Rec'd. orig. & 40 copies addl.

authorities for motion to recall mandate.(LEAD JUDGE) (copies to casefile) [90-35312] (jlc)

7/22/92 Filed order (Arthur L. ALARCON): appellant's motion for an order permitting the filing of an excerpt is granted. [90-35312] (jlc)

Docket as of August 22, 1992 11:25 am
Page 7

Proceedings include all events.

90-35312 Brewer. et al v. Erwin & Erwin. P.C.

7/22/92 Filed order (Arthur L ALARCON): aplt's petition for relief from judgment pursuant to Rule 60 of the FRCP, for arrest of judgment, and for reconsideration

of the opinion of this court is denied. Aplt. Erwin & Erwin, P.C. is directed to pay a sanction of $2,500 plus interest until paid to the Clerk of this Court pursuant to Rule 38 of FRAP. Judge Alarcon votes against the imposition of a further sanction. [90-35312] (jlc)

7/28/92 Filed order (Arthur L. ALARCON): the order filed 7/22/92 directing aplt. Erwin & Erwin, P.C. to pay a sanction of $2,500 plus interest is hereby ordered vacated. [90-35312] (jlc)

8/5/92 Filed Appellant Erwin & Erwin, P.C. original & 40 supplemental excerpts of record on appeal in 1 volume to accompany petition for rehearing en banc per 7/22

order.(PANEL & ALL ACTIVE JUDGES) (jlc)

8/6/92 Received Appellant Erwin & Erwin, P.C. leter dated 8/3 re: pending petitions.(PANEL) [90-35312] (jlc)

8/10/92 Filed order (Arthur L. ALARCON, Waren J. FERGUSON, Cynthia H. HALL): Aplt's petition for relief from judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure for arrest of judgment and for reconsideration of the opinion of this court is denied. Aplt, Erwin & Erwin, P.C. is directed to pay a sanction of $2,500 pursuant to Rule 38 of the FRAP. Judge Alarcon votes against the imposition of a further sanction. [90-35312] (jlc)

8/11/92 Sent current docket sheet to Warde H. Erwin [90-35312] (jlc)

8/13/92 Filed order (Arthur L. ALARCON, Warren J. FERGUSON, Cynthia H. HALL): the petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. [90-35312] (jlc)

8/25/92 Sent current docket sheet to attorney Warde H. Erwin. [90-35312] (jlc)

Number _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,

Debtor,

SUZAN BREWER,

Plaintiff-appellee,

vs.

ERWIN & ERWIN, Professional Corporation,

Defendant-appellant.

TRANSMISSION OF RECORD ON APPEAL

APRIL 24, 1990

Warde H. Erwin
Counsel of Record for Defendant-appellant

Address: 2110 SW Jefferson Street
Portland, Oregon 97201

Charles C. Erwin
Additional Counsel
Address: 2110 SW Jefferson Street
Portland, Oregon 97201

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TRANSMISSION OF RECORD

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

TO

NINTH CIRCUIT COURT OF APPEALS

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UNITED STATES DISTRICT COURT

OFFICE OF THE CLERK

DISTRICT OF OREGON

503 Gus J. Solomon United

States Courthouse

620 SW Main

Portland, Oregon 97205-3090

503) 326-2202 FTS 424-2202

ROBERT M. CHRIST DONALD M. CINNAMOND

Clerk of Court Chief Deputy Clerk

April 24, 1990

=

Clerk of Court

United States Court of Appeals

Ninth Circuit

450 Golden Gate Avenue, 18th Floor

San Francisco, California 94102

Subject: Transmission of the Record

on Appeal

Case Name: FRANZWA V. MULLENNEX

Case No.: CV 88-915RE BKCY CA 90

Enclosed are the following parts of the record on appeal in the instant action:

_1_ Volumes __ thru __ of the case record

_2_ Transcript Volumes _____ - _____

___ Presentence Reprot (PSI)

___ Exhibits

___ Record retained in the District Court

___ Other: ORIGINAL DOCUMENTS #35, 38-41

_____

_____

ACKNOWLEDGEMENT OF RECEIPT

Date Received: _____

Typed Name/Signature: _____

cc: Counsel of Record

File

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN B. FRANZWA, INC.,	)	
	)	
PLAINTIFF-APPELLANT,	)	
	)	CA NO. 90-
V	)	
	)	OREGON USDC
LAVELLE MULLENNEX, ET AL.	)	CV 88-915RE
	)	
DEFENDANTS-APPELLEES.	)	
	)	

RECORD ON APPEAL

FROM THE DISTRICT COURT OF OREGON

RECORDED IN 3 VOLUMES

CLERK'S RECORD IN 1 VOLUMES

REPORTER'S TRANSCRIPT IN __ VOLUMES

THE HONORABLE JAMES A. REDDEN,

TRIAL JUDGE

NAMES AND ADDRESS OF ATTORNEYS OF RECORD

FOR APPELLANT:

Charles Robinowitz
1211 SW 5th Ave.#2962
Portland, OR 97204
(503) 226-1464

FOR APPELLEE:

Charles C. Erwin
Erwin & Erwin,P.C.
3323 SW Harbor Dr.
Portland, OR 97201
(503) 226-4525

CA # 90

OREGON D USDC # CV 88-915RE

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REPORTER'S TRANSCRIPT OF PROCEEDINGS HAD April 2, 1985 before Honorable Henry L. Hess, Jr. (original).

REPORTER'S TRANSCRIPT OF PROCEEDINGS HAD May 6, 19085 before Honorable Henry L. Jess, Jr. (original).

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JOHN B. FRANZWA, INC., PLAINTIFF-APPELLANT, v LAVELLE MULLENNEX, ET AL., DEFENDANTS-APPELLEES.	CLERK'S CERTIFICATE CA No. 90- OREGON USDC #CV 88-915RE

UNITED STATES OF AMERICA)
) SS:
DISTRICT OF OREGON)

I, ROBERT M. CHRIST, Clerk of the United States District Court for the

District of Oregon, do hereby certify that the documents listed in the foregoing index constitute the record on appeal in which appellant(s) appeals from ORDER of 3/9/90 : that the said record has been prepared by me in accordance with the rules of this court.

I further certify that the cost of filing of the notice of appeal, $5.00 has been paid by the appellant(s).

IN TESTIMONY WHEREOF I have have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 24th day of April . 10 90 .

ROBERT M. CHRIST, CLERK

Tamara J. Ely

BY Tamara J. Ely, Deputy

Number _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,

Debtor.

SUZAN BREWER,

Plaintiff/Appellee,

vs.

ERWIN & ERWIN, P.C.,

Defendant-Appellant.

APPELLANT'S BRIEF FROM DISTRICT COURT FOR THE STATE OF OREGON

Warde H. Erwin
Counsel of Record for Defendant-Appellant
Address: Suite 100
2110 SW Jefferson Street
Portland, Oregon 97201-7702

Charles C. Erwin
Additional Counsel
Address: Suite 100
2110 SW Jefferson Street
Portland, Oregon 97201-7702

Number _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,)
)
Debtor.)
)
SUZAN BREWER,)
)
Plaintiff/Appellee,)
)
vs.)
)
ERWIN & ERWIN, P.C.,)
)
Defendant-Appellant.)

APPELLANT'S BRIEF FROM DISTRICT COURT FOR THE STATE OF OREGON

Warde H. Erwin
Counsel of Record for Defendant-Appellant
Address: Suite 100
2110 SW Jefferson Street
Portland, Oregon 97201-7702

Charles C. Erwin
Additional Counsel
Address: Suite 100
2110 SW Jefferson Street
Portland, Oregon 97201-7702

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BEST AVAIL

CHARLES C. ERWIN
3323 S.W. Harbor Drive
Portland, Oregon 97201
Phone: (503) 226-4525
Attorney for Creditor/Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: MARQUAM INVESTMENT CORPORATION, Debtor.	No. 90-35312 U. S. District Court No. 88-0915-RE
SUZAN BREWER, Plaintiff/Appellee, -vs- ERWIN & ERWIN, P.C., Defendant-Appellant.	APPELLANT'S BRIEF

APPEAL FROM DISTRICT COURT

FOR DISTRICT OF OREGON

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

THE BANKRUPTCY COURT FINDING

The Bankruptcy Judge heard and ruled upon an objection to a claim of a Creditor of Debtor, Marquam Investment. That claim is comprised of substantial legal services performed for the Debtor by its attorneys, Erwin, Lamb & Erwin, P.C., during the period prior to Debtor's Petition in Bankruptcy.

The objection was made by another Creditor of the Debtor. She made a single objection: that the legal services performed were intended to be donated to the Debtor without compensation whatsoever.

The Bankruptcy Judge held the Creditor law firm did not intend to donate these substantial legal services to the Debtor.

DISTRICT COURT REVIEW

The District Judge, without hearing

or argument, considered material not in the record, made new findings, and reversed the Bankruptcy Judge.

The District Judge, as reviewer, held the Creditor did intend to donate these substantial legal services to the Debtor, and denied the claim in its entirety.

This court is asked to examine the District Judge's decision of reversal.

THE ISSUES ON APPEAL

1) May the reviewing judge examine evidence outside the record presented to the Bankruptcy Judge?

The reviewing judge expressly concedes he examined material not presented to the Bankruptcy Judge. He states "the Bankruptcy Judge did not consider later developments."
(See App. Exc. Findings District Court p. 20)

Appellant contends that the

District Court, on review, can only consider the evidence presented to the Bankruptcy Court, and made a part of that record. The District Court may not make its own findings.

Re Ellerle Farms, Inc., 861 F2d 1089, 1090 (8th Cir. 1988).

2) May a reviewing judge draw new inferences from the record when he applies the relevant standard of review?

The reviewing judge in this case, drew new infereces opposing those of the Bankruptcy Judge. He then found the Bankruptcy Judge's finding to be "clearly erroneous."

The term "clearly erroneous" has been defined by the Supreme Court in Anderson v. City of Bessemer City 470 U.S. 564 (1984)

STANDARD OF REVIEW

In cases where the Bankruptcy Judge's findings are reversed by a

District Judge on review, the Court of Appeals is to apply the "clearly erroneous" standard to the decision of the Bankruptcy Judge. That standard is not to be applied to the District Judge's decision of reversal.

Universal Minerals, Inc. v. C. A. Hughes Co. 669 F.2d 98, at 101 (3rd Cir. 1981)

Re Wein Air Alaska, Inc. v. Bachner, 86 F2d 1106, (9th Cir. 1989).

Re Windmill Farms, Inc., 841 F2d 1467 (9th Cir. 1988)

The applicable standard of review is Bankruptcy Rule 8013:

"On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact whether based on oral or documentary evidence shall not be set

aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."

STATEMENT OF JURISDICTION AND TIMELINESS

STATUTORY BASIS FOR JURISDICTION

District Courts review Bankruptcy Court decisions. 28 U.S.C. 158(a)(b).

The Court of Appeals reviews decisions made by District Courts sitting in review of bankruptcy decisions. 28 U.S.C. 158(d).

THE ORDER IS FINAL

The Bankruptcy Court Order

The Bankruptcy Judge divided the hearing of the claim into two parts.

The Bankruptcy Judge decided the claim for fees was not intended to be donated to the Debtor. Accordingly, he held the claim was valid and the claimant was entitled to fees. In a subsequent

hearing, he decided the amount sought was reasonable.

The Reviewing Court Order

The District Court reviewed the Bankruptcy Bankruptcy Judge's decision. The District Court ruled that it would confine review to the Bankruptcy Court's decision, of the validity of the claim of fees, only, not the amount. (App. Exc. D.C. Docket p. 35)

The reviewing court did not review the record of the bankruptcy hearing involving the components of the fees. No record was prepared. No briefing was done on that question. (See App. Exc. D.C. Docket 35-end)

The reviewing judge reversed the Bankruptcy Judge, holding the claimant was not entitled to its claim. The reviewing judge directed the claim be denied in its entirety.

The order is final.

TIMELINESS

The final order of the District Court was entered March 8, 1990. (App. Exc. D.C. Docket p. 35)

The notice of appeal was filed April 5, 1990, within the period of 30 days granted by F.R.A.P. rule (4)(a)(1). (App. Exc. D.C. Docket p. 35, Notice of Appeal p. 1)

STATEMENT OF THE CASE

NATURE OF CASE

Debtor filed a petition in bankruptcy listing the debt, to the Appellant in the amount of $120,000.00 for various legal services.

Brewer filed an objection contending the services were intended to be given to the Debtor for no compensation and that the Appellant never intended to be paid.

COURSE OF PROCEEDINGS

THE BANKRUPTCY COURT HEARING OF THE VALIDITY OF THE CLAIM

An outline of the claim was prepared. (App. Tr. V 1, p. 48)

Judge Hess, after hearings held on April 12, 1985, and May 6, 1985 (App. Exc. Trs. V 1 and V 2), concluded the services were not intended to be gratuitous, and allowed the claim. (App. Exc. Bankruptcy Judge Findings pp. 2 - 9)

The Bankruptcy Judge deferred the question of the reasonableness of the amount claimed to another hearing. (App. Exc. Bankruptcy Judge findings, p. 9)

The question of the reasonable value of these services was heard by the Bankruptcy Court in that later hearing.

THE REASONABLENESS OF THE AMOUNT

For that second hearing, and at the

request of the Bankruptcy Judge and Brewer, a supplemental exhibit outlining the claim was prepared.

That outline contains 65 pages of state court docket sheets, and reviews in detail the time spent in the various categories of work, reconstructed from state court records and from Appellant's files and time records.

In addition, the supplemental exhibit contained outline of amounts, agreed by the parties, to be the correct amount allowable in setoff against the lease under which the claimant rented property owned by the Debtor.

The transcript of the hearing and the supplmental exhibit was not part of the record which was presented to the District Court for review.

That document and the time slips for the services involved were made exhibits

at the second hearing. There was also considerable testimony.

In summary, the supplemental exhibit shows:

1) Total time involved in the services for Marquam: estimated to be 1,475 hours.

Total time after detailed analysis was 1,650.75 hours.

2) Total setoff against the rental obligation owed to Debtor was originally estimated to be $15,658.00.

Total setoffs against the rental owed to Debtor after a detailed analysis of its books was agreed by Brewer and this claimant to be $13,056.73.

3) The appellant has also advanced litigation costs and expenses for the Debtor, of $8,272.91 in cash.

4) That about 42% of the services performed for the debtor, were

performed in matters having nothing to do with litigation involving Brewer.

The reviewing judge considered the supplemental document, even though the transcript of testimony and numerous other documents which supported it were not part of the record.

The review of this document, which was not part of the record, caused the district judge to draw conclusions which were mistaken, both in fact and in the new inferences which he came to draw in his findings.

THE DISTRICT JUDGE'S REVIEW

The District Judge reviewed the trial judge's finding as to the validity of this claim.

The District Judge expressly ruled that the record with respect to the reasonableness of the fees involved,

would be submitted to him after he reviewed the question of whether the legal services were intended by the Claimant to be given without compensation. (App. Exc. Docket p. 35)

We list below those items which the reviewing judge considered, over our specific written objection in brief, at footnote 1.

1 Erwin & Erwin objected to the reviewing judge considering material not before the Bankruptcy Judge. Those materials objected to in the reviewing judge's court, are as follows.

Brewer designated a number of documents in her excerpt, before the reviewing judge, which were not received or con-sidered at trial. She argued certain propositions from those documents in spite of the fact they were considered for a particular limited purpose, or were not part of the record below.

Brewer's excerpt p. 54 - 71:

evidence was admitted by stipulation. See App. Exc. Transcript V 1, pp. 174 - 177.

Brewer's excerpt p. 75 - 87:

This document was not considered by the Bankruptcy Judge. However, Judge Marsh has specifically reserved the question of how much was actually paid, and what the reasonable value of the tenancy was during the relevant period.

Judge Marsh has, by remand order, asked the bankruptcy judge to establish the value of the tenancy and to calculate the actual rental paid toward that obligation.

Brewer's excerpt p. 11-12:

This document was not considered by the Bankruptcy Judge. This document was prepared after the conclusion of the record as to the validity of the claim, at the express request of the trial judge and Brewer's counsel, both of whom

requested a detailed analysis from time records, and records of the state court. The claimant undertook several hours' time to comply with these requests.

In spite of this objection, the District Judge commenced to consider these "excerpts" served up by Brewer at District Court review, in spite of his knowledge they were not in the record of the bankruptcy hearing.

THE BANKRUPTCY TRIAL COURT PROCEEDINGS
Brewer called witnesses.

Brewer offered exhibits, and the parties stipulated to two additional pieces of evidence.

The stipulated testimony of Judge Abraham was received. (App. Exc. Transcript V 1, p. 174 - 177)

The Planning Commission's written approval of debtor's realty development also was received by stipulation. (App. Exc. Transcript V 2, p. 174)

Erwin & Erwin, P.C. introduced exhibits. Charles Erwin, a member of the Appellant's law firm, testified (App. Exc. Transcript V 2, pp. 97 - 172), as did LaVelle Mullennex, an officer of Debtor (App. Exc. Transcript V 2 pp. 49 - 97).

Argument appears at App. Exc. Transcript V 2, p. 179 - 194.

The court's findings appear at App. Exc. p. 2 and App. Exc. Transcript V 2, p. 194.

STATEMENT OF FACTS

The Debtor was always aware of the work being provided by its attorneys and the extent of that work. Ms. Mullennex, herself, a shareholder of debtor, typed many of the creditor's motions and other litigation documents, and was completely familiar with the scope and nature of the legal services provided to the Debtor. (App. Exc. Transcript V 2, p. 50 - 52).

This is because in addition to being a shareholder of Marquam, she was also an employee of Erwin, Lamb & Erwin, P.C.

Ms. Mullennex prepared time slips, and was familiar with their content. Erwin, Lamb & Erwin, P.C. also advanced litigation expenses.

Ms. Mullennex produced at trial (App. Exc. Transcript V 2, p.57), time slips representing hundreds of hours of service rendered to Marquam by this creditor.

These slips were made daily at the time the work was performed. (App. Exc. Transcript V 2, p. 61).

There was never any intention to make a gift of the services rendered to Marquam. (App. Exc. Transcript V 2, p. 80)

The Debtor always understood that it would be responsible for these legal fees.

She kept the financial books of Marquam on a cash basis. (App. Exc. Transcript V 2, p. 63)

The Bankruptcy Court heard testimony from two C.P.A. witnesses. Both were asked whether or not it would be proper to record any amounts owing to creditors as a result of non-cash transactions in the debtor's books.

The answer by both C.P.A.'s is that it would be improper to record payable amounts in the books and records of the debtor, using the accounting method which debtor had historically used. (Mr. Solomon, C.P.A. App. Exc. Transcript V 1, p. 195 - 197, p. 207 - 213, Mr. Roy Griffin, C.P.A., p. 215 - 220).

The witnesses called on these points did not supported Brewer's contention that liabilities are <u>required</u> to be listed where books are kept on a cash basis, or that billings are required to

be sent under the circumstances here. Mr. Charles Erwin insisted that payment of prior legal fees by Marquam be made to his law firm. (App. Exc. Transcript V 2, p. 104) (The bargain he had for payment of fees appears at p. 104.)

The work Charles Erwin did during that period, proved eventually to be so extensive, that it was almost to the exclusion of other work.

App. Exc. Transcript V 2, p. 98, (and exhibits) describe some of the time involved in some litigation with Brewer and comprise more than $40,000.00 in fees. (App. Exc. Transcript V 2, p. 98 - 101)

Charles Erwin could not afford to make any gifts. His gross income for the periods were: $15,000.00 for 1978, $19,995,00 for 1979, $20,250.00 for 1980, $13,000.00 for 1981, and $31,000.00 for 1982. He had to borrow $21,000.00 in

1981 just to pay bills. (App. Exc. Transcript V 2 p. 105)

Payment by Marquam to Erwin, Lamb & Erwin, P.C. was discussed. (App. Exc. Transcript V 2 p. 79)

Brewer argued that nothing was done to pursue realty development after September 1980. She urged that there were no plans to pay the Debtor's attorneys.

There was evidence presented to the contrary. (App. Exc. Transcript V 2 p. 141 - 144.) In fact, Marquam had received development financing, sought and received development approvals.

During the period, Marquam reduced debt by payment of all mortgages on realty committed to development. (App. Exc. Transcript V 2, p. 65), and purchased additional land (App. Exc. Transcript V 2, p. 67 - 68)

The Debtor, architects, and Mr.

Warde Erwin were engaged in financing and planning approvals for the development. (App. Exc. Transcript V 2, p. 84 showing loan approvals in 1982)

The values of the property of Marquam were listed in the schedules at approximately assessed value; attorney fees and other debts would have been paid from funds received by the debtor for its land. (App. Exc. Transcript V 2, p. 83)

The documents regarding the condominium development provided for payment to Marquam for its land in the amount of $150,000.00 (App. Exc. Transcript V 2, p. 102). Financing was arranged. (App. Exc. Transcript V 2, p. 102 - 103). If material prices rose, Marquam would receive not less than $127,500.00 for land.

Marquam was to have retained all improved property and would receive $127,500.00 to $150,000.00 for the realty committed to the realty development in

addition to retaining the improved realty. (App. Exc. V 2, p. 168)

The work for realty development legal work came from the project revenue, after Marquam had received payment for its land. But all other attorney fees (not for realty development) must be paid by Marquam. (App. Exc. Transcript V 2, p. 104).

The parties stipulated no further City approvals were necessary to go forward with construction. (App. Exc. Transcript V 2, p. 173 - 174) The project was virtually ready for market.

The revenue from the sale of Marquam's land was one obvious source of payment. Marquam's improved property was another additional source.

Charles C. Erwin described the circumstances surrounding the services rendered and the history of the cases in which the attorney were involved.

While the law firm is the claimant, most services were done by Charles C. Erwin. (App. Exc. Transcript V 2, p. 118)

In a 1980 state court case, Marquam was asked to stipulate to the value of its realty in lieu of expert testi-mony. Marquam did so stipulate. There was no evidence or stipulation regarding its net worth or debt, whatsoever.

Brewer's counsel did not inquire, although they were aware of these obliga-tions. (App. Exc. V 2, p. 153)

In May 1982, Brewer brought suit in State court to set aside the transfer of easements and land committed to the project.

State Court Judge Philip Abraham's evidence came by stipulation. The stipu-lation is found at App. Exc. Transcript V 1, pp. 174 - 182.

In this 1982 case, the subject was

whether or not the transfer of part of Marquam's realty, for future payment, would hinder or delay Brewer. Marquam retained improved and realty and land of a value equivilant to pay its creditors, in addition to the land which it committed to the development project. No stipulation was sought nor received, nor did Brewer inquire on the subject of creditors other than herself. (App. Exc. Transcript V 2, pp. 153 - 153)

The state court judge found the evidence prepon-derated to establish a possible delay or hindrance.

As a direct result of this suit by Brewer, the debtor's financing commitments were revoked, and the purchasers' deposits had to be returned. The debtor became unable to generate funds to pay its debts and bankruptcy followed.

ARGUMENT

THE DISTRICT JUDGE ERRED WHEN HE

CONSIDERED MATTERS WHICH WERE NOT IN THE RECORD.

The reviewing judge made new findings, based upon documents and events not in the record.

1. The reviewing judge found, among other things, that Erwin, Lamb and Erwin, P. C. did not "adequately support its claim".

The reviewing judge cites no requirements for "adequate support" beyond what was given in evidence at the lower court.

The issue reviewed by the District Judge was whether or not the claimant intended to donate legal services to its client, the Debtor. No issue was presented claiming that the elements supporting this claim were "inadequate."

The District Judge did have properly before him over 300 hundred pages of transcript which demonstrated not only

that the claimant intended to be compensated, but which record discussed the method by which that compensation would have been achieved. The proceeds due the debtor from land committed to the realty development was a source of funds to pay claims of creditors.

The District Judge considered the booklet describing the basis for the claim of the attorneys. (See p. 6 above) (While this document was never part of the record of the case the reviewing judge did consider it.) That document contained 65 pages of detailed description of the work done for the Client Debtor and contained a summary of time slips.

However, in view of the fact the reviewing judge considered over 65 pages of documentation outside the record, it is difficult to identify what more support

could be expected, even if the issue were properly before the reviewing judge.

2. The reviewing judge found the rental setoff, originally estimated at some $15,658, to have "disappeared and re-appeared as a different setoff." (App. Exc. D.C. Opinion pp. 23 - 24) He made a finding that amount was "13,056.73 for utility bills Erwin, Lamb & Erwin paid."

The basis for this finding is found nowhere in the record submitted to the Bankruptcy Judge. That statement is also nowhere in the booklet (which is not part of the record, but which the reviewing judge examined neverthless).

The source of this finding is a complete mystery. Review of the trial which involved this part of the claim was not one committed to the reviewing judge, because the components of the amount of this claim, and setoffs were not part of the record before the reviewing judge.

If the reviewing judge had considered the record of the hearing on amount, he would have known the parties had agreed the amount of the setoff allowable to be a maximum of $13,056.73. The reviewing judge chose instead to assume without any support from the record, that these amounts were "utility bills paid" by this claimant.

In the absence of transcript, and in the absence of hearing which would have allowed the reviewing judge to ask about the subject, he reached an erroneous conclusion.

3. The District Judge concluded Erwin, Lamb "dropped its claim for legal work on the Realty development project." (App. Exc. Findings District Court, p. 24)

This finding evidently comes from sources outside the record reviewed by the District Judge.

The record shows that this

"claim for legal fees for realty work" was to be paid from the Realty development revenue, not from the Debtor. (See App. Exc. Transcript V 2, p. 104).

The Bankruptcy Judge also found so. (App. Exc. Findings Bankruptcy Judge p. 4-5)

As a result of sales of the project, the Debtor would have received revenue from its land to pay its creditors. The Debtor was not itself to pay development legal fees from its land committed to the project.

Discussion of the work involved in bringing the development to market were introduced to to meet the Brewer's claim that Debtor had no ability to pay "such large fees" and that the Debtor was doing nothing to generate the funding to pay claims.

They illustrate the efforts of Debtor to generate money to pay claims.

They were not presented as support for the claim itself, rather they show the Debtor's efforts to generate funds were substantial and ongoing.

The reviewing judge was not justified in drawing conclusions from the summary of work done, which was not part of the record before him. That document was prepared long after the record which was committed to the District judge for review had closed, and was not accompanied by the record and trial exhibits which are necessary to full understanding of the document.

But the conclusions which he reached are not supported even by consideration of the booklet itself.

4. The District Judge took into account a ruling of another District Judge in another matter. (App. Exc. Opinion District Judge, pp. 18, 19)

That ruling likewise was not part of

the record before the Bankruptcy Judge nor the record before the reviewing judge. (App. Exc. District Judge Opinion p. 18, citing Judge Marsh, June 13, 1986). This record on review closed in 1985.

There was no opportunity for the Appellant to brief or argue the propriety of consideration of documents, not in the record or opinions of other judges, similarly not in the record. The reviewing District Judge neither allowed argument nor gave notice of his intent to rule without hearing as Rule 8012 Bankruptcy Rules requires.

5. The reviewing judge quotes from State Court Judge Philip Abraham. Those quotes are found at App. Exc. District Court Findings pp. 17, 18 and 30.

The actual content of the state judge's submittal is found at App. Exc. Transcript V 1, pp. 174 - 182, in the

proceedings before the Bankruptcy Judge.

The passages quoted by the reviewing judge cannot be located anywhere in the record presented to the Bankruptcy Judge

6. The District Judge found Marquam brought an action against Aetna Insurance claiming it had incurred "$120,000.00 in legal fees during its tort litigation with Brewer," and (then) "sought only $25,600.00 for the same services in Bankruptcy Court." (App. Exc. Findings District Court p. 27)

There is no support for this finding in the record. These findings by the reviewing judge are the product of something other than the Bankruptcy Court evidence.

Marquam did bring state court claims against its insurer asking for defense costs reimbursement under the policy of insurance.

There was no hearing in which the

elements comprising the claim against Aetna was heard. Had the reviewing judge examined the attorneys for Marquam and Aetna in that case, he would have found the prayer of Marquam was for defense costs in a wide range of claims made by Marquam's tenants.

Those defense costs were for (not less) than the following matters.

Marquam v. Meyers	Defense of counterclaims in F.E.D.
	Writ of review and appeal thereof
	Defense of counterclaims in F.E.D. on remand
Marquam v. Brewer	Defense of counterclaims in F.E.D.
Brewer v. Beers	Writ of Mandamus arising from F.E.D.

Marquam v. Brewer	Trial of F.E.D. and counterclaims
Marquam v. Peck	Defense of counterclaims
Brewer v. Marquam	Defense of tort claims

The prayer against its insurer was most certainly not exclusively for reimbursement of "Brewer tort claim defense costs."

The record is barren of any claim by this Appellant for "only $25,600.00" for the services in defense of the several claims brought against the Debtor by its tenants. Such an amount would be unreasonably low, in view of the scope of work necessary to defend the claims involved in the onslought of protracted litigation with the tenants of the Debtor in State Court.

The source of these findings is unknown.

The finding of the reviewing judge on this point appears to have no basis even outside the matters which the reviewing judge did consider.

The consideration and reliance placed upon material outside the record was error.

APPLICABLE LAW

Additional findings to those of the Bankruptcy Court are not to be made by the reviewing court.

A reviewing court may not substitute its own findings for those of the primary tribunal merely because it finds other inferences more likely.

Universal Minerals, at 104.

A reviewing court may not consider the evidence de novo and must be particularly reluctant to disregard a finding based on evaluation of testimony drawing

credibility into question. Re Multiponics, 622 F.2d 709 (5th Cir. 1980) Anderson, 470 U.S. at p. 575.

The findings on questions of intent are questions of fact, or in some instances, mixed questions of law and of fact, and the findings will not be set aside on anything less than a demonstration of clear mistake in applying the law.

Tepper v. Chichester, 285 F.2d 309 (9th Cir. 1960)

Questions of intent are factual and committed to the trial court. The reviewing court is not at liberty to arrive at different conclusions by emphasizing different inferences which might be drawn. Universal Minerals, at p. 104

Questions of intent are to be drawn from the testimony and conduct of the witness. The Eighth Circuit has observed In Re Neis:

"The issue of Don Neis' intent to abandon or create a particular homestead is a question of fact, or of inference to be drawn from facts, for the bankruptcy court to determine. Once such a determination is made, the district court in review may only accept such findings or reject them as 'clearly erroneous;' the district court may not accept the findings of the bankruptcy court and then go on to make additional findings having the effect of contradicting the conclusions of the bankruptcy court.

. . . . .

"Further, a determination of intent is necessarily based both on inferences to be drawn from the conduct of the individual whose intent is in question and on his testimony. The bankruptcy judge had the opportunity

to observe Neis throughout the proceedings and on the witness stand and to evaluate his credibility. It is precisely because of this unique opportunity that the ability of the reviewing court to disturb findings of fact is limited."

Re Neis, 723 F.2d 584, 589 (7th Cir 1983)

THE BANKRUPTCY JUDGE'S FINDING THAT THE CLAIMANT INTENDED TO BE COMPENSATED FOR VALUABLE LEGAL SERVICES WAS NOT CLEARLY ERRONEOUS.

In cases where the Bankruptcy Judge's findings are reversed by a District Court on review, the Court of Appeals is to apply the "clearly erroneous" standard to the finding of the Bankruptcy Judge.

"... As an appellate court twice removed from the primary tribunal, we

review both the factual and the legal determinations of the district court for error. The district court does not sit as a finder of facts in evaluating them as a court of review, and therefore its evaluation of the evidence is not shielded by the 'clearly erroneous' standard of Fed. R. Civ. P. 52(a), which applies only to a trial court sitting as a fact finder. We are in as good a position as the district court to review the findings of the bankruptcy court, so we review the bankruptcy court's findings by the standards the district court should employ, to determine whether the district court erred in its review. . . ."

Universal Minerals,, at pp. 101 - 102.

Re Wein Air Alaska, Inc. v. Bachner, 860 F2d 1106, (9th Cir. 1989)

Re Windmill Farms, Inc., 841 F2d 1467 (9th Cir 1988)

The Supreme Court has discussed the meaning of "clearly erroneous".

> "Although the meaning of the phrase 'clearly erroneous' is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized, is that '[a] finding is erroneous'" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake

has been committed.' United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.W. 100, 123 (1969). If the district court's account of the

evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949); see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.W. 844 (1982).

"This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts. To be sure, various Courts of Appeals have on occasion asserted the theory that an

appellate court may exercise de novo review over findings not based on credibility determinations. See, e.g., Orvis v. Higgins, 180 F.2d 587 (CA6 1981); Swanson v. Baker Industries, Inc., 615 F.2d 479, 483 (CA8 1980). This theory has an impressive genealogy, having first been articulated in an opinion written by Judge Frank and subscribed to by Judge Augustus Hand. See Orvis v. Higgins, supra, but it is impossible to trace the theory's lineage back to the text of Rule 52(a) which states straightforwardly that 'findings of fact shall not be set aside unless clearly erroneous.' That the Rule goes on to emphasize the special deference to be paid credibility determinations does not alter its clear command: Rule 52(a) 'does not make exceptions or purport

to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous.' Pullman-Standard v. Swint, 456 U.S., at 287.

"The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accurancy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already

been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be 'the main event' . . . rather than a 'tryout on the road.' Wainwright v. Sykes, 433 U.S. 72, 90 (1977). For these reasons review of factual findings under the clearly erroneous standard with its deference to the trier of fact -- is the rule, not the exception.

"When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only

the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. See Wainwright v. Witt, 469 U.S. 412 (1985). This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story, or the story itself may be so internally inconsistent or implausible on its fact that a reasonable fact-finder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based

on a credibility determination. See, e.g., United States v. United States Gypsum Co. supra at 396. But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. Cf. United States v. Aluminum Co. of America, 148 F.2d 416, 433 (CA2 1945); Orvis v. Higgins, supra, at 539-540."

Anderson v. City of Bessemer City, 470 US at 573-576

The Reviewing judge incorrectly drew new inferences opposing those of the Bankruptcy Judge.

1. Time slips for the work involved in the claim were kept regularly. (App. Exc. Transcript V 2 p. 56-57)

The Bankruptcy Judge found this significant. (App. Exc. Findings Bankruptcy Judge p.7)

The District Judge accepted that they were so kept. (App. Exc. Findings District Court p. 26). He then holds the "(claim in Bankruptcy) does not reflect such records" (Findings p.26) and the "claimants claim should be rejected as without documentation" (Findings p.29)

This inference is not justified. The fact is that the timeslips were both kept and produced in the Bankruptcy Court trial. (They also are exhibits in the hearing on amount, which was not reviewed by the District Court.)

2. The record in Bankruptcy Court showed a method by which the debtor could have paid this claim.

The reviewing judge drew a new inference. He calculated that "if (the debtor) were paid for its land, it would receive at most only $30,000 more than the" fees owed to attorneys. The attorneys "would have rendered its client insolvent." (App. Exc. Findings District Court p. 30)

This new finding is unsupported even by inference.

The evidence is uncontradicted that the Debtor retained an office building apart from land committed to the residential project. (App. Exc. Transcript V 2 p.168)

3. The reviewing judge drew new inferences from the fact bills were not sent to the Debtor.

The Bankruptcy Judge found such billings would have been to no good purpose, without the Debtor having present

funds to pay. (App. Exc. Bankruptcy Court Findings p. 6)

While the reviewing judge concedes the reason is that such billings would be pointless since the client had no present funds, then he finds "(this failure) shows an incestuous relationship." (App. Exc. Findings District Court p. 26)

The evidence shows the debtor did not have the present funds to pay this claim. The debtor was at all times completely aware of the scope and extent of the services being provided in all categories of the work claimed. One of the Debtor's stockholders kept regular time records of the elements which made up the claim. (See Facts above pp. 10 - 11).

4. The reviewing judge drew new inferences from state court proceedings, "Marquam did not disclose the claim for legal fees in state court proceedings." (App. Exc. District Court, p. 17)

The reviewing judge found evidence that Brewer (the opponent) did know of the existence of such claims, at least in cases where fees were sought against Marquam's tenants in state court litigation. (App. Exc. Findings, District Court, p. 28)

Brewer did not inquire in state court about fees owed by Debtor, inspite of this knowledge.

The evidence showed the circumstances. (See App. Exc. Transcript V 1, p. 153)

The trial judge observed there was no duty to disclose these amounts under the circumstances presented within the state court litigation. (App. Exc. Transcript V 2, p. 154)

The reviewing judge disposes of Brewer's early knowledge and the Bankruptcy Judge's observation by saying, "The explanation does not seem

'adequate'" and "Brewer is not responsible for raising such evidence." (App. Exc. Finding, District Court, p. 28)

The reviewing judge drew a different inference from the evidence in the record.

He did not speak to the evidence offered describing the circumstances of those state court proceedings, other than to weigh the adequacy of this evidence. He finds no basis to reject the finding of the trial judge.

The reviewing judge drew opposing inferences from those made by the Bankruptcy Judge. This was error.

APPLICABLE LAW

New inferences opposing those of the Bankruptcy judge are not permitted to be made by a reviewing court.

".... The district court chose, however, to emphasize other facts not

mentioned in the bankruptcy court's opinion and to draw opposing inferences from the record. In doing so, the district court erred. A reviewing court may not substitute its own findings for those of the primary tribunal merely because it finds other inferences more likely."

Universal Minerals, at p. 104

"The reviewing court oversteps the bounds of its duty under Rule 52(a) when it undertakes to duplicate the role of the lower court."

Anderson, 470 U. S. at p. 564.

The Appellant contends the reviewing judge failed take account of the requirements of Anderson.

He failed to keep in mind that his function is not to decide factual issues de novo.

He failed to take account that the Bankruptcy Judge accepted a plausible

version based upon the record presented to him in its entirety, and that even if the reviewing Judge would have decided differently, had he tried the case, he may not do so in his role as reviewing judge.

The reviewing judge did not keep in mind that the case rested in some significant part upon the credibility of the witnesses presented at the Bankruptcy hearing. The Bankruptcy Judge observed their demeanor and heard them.

> "When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and

belief in what is said. See Wainwright v. Witt, 469 U.S. 412 (1985)."

Anderson, at 575.

He decided to accept one version of the facts over another.

". . . Where there are two per-permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949); see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982)"

Anderson, 470 U.S. at p. 574

The Bankruptcy Judge's finding and the reviewing court's new and different findings might present two choices, but under the law, the Bankruptcy Judge's choice is not clearly erroneous.

When tested by the rules of analysis announced by the Supreme Court, the Bankruptcy Judge should be affirmed. More directly put, by Justice Powell in Anderson, where factual versions could be decided for either party, based upon the record of the case, the lower court's decision cannot be clearly erroneous.

Anderson, 470 U.S. at p. 581

CONCLUSION

The District Judge reversed the Bankruptcy Judge's findings, and went forward to make his own findings. Several new findings were derived from matters not in the record on review.

The reviewing judge's analysis and the new findings he made are flawed by his extra record excursion.

Other findings were derived from reviewing the record and then drawing inferences different from those of the Bankruptcy Judge.

New inferences are not to be drawn by reviewing courts.

The District Judge found the appellant's claim as a Creditor in the Bankruptcy to be a "skirmish in a war." (App. Exc. Findings, District Court p. 11) He remarked, the presentation by both sides to the Bankruptcy Court was "unhelpful" and that the case had become a "feud" between the parties and their counsel. (App. Exc. Findings District Court p. 21) He observed that since the claim was allowed, punitive damages collection would be "obliterated." (App. Exc. Findings District Court p. 12)

These quotations from the reviewing judge's opinion demonstrate the personal view held by the author of reviewing judge's opinion.

Perhaps these remarks explain why the reviewing judge felt a result, different from that which the Bankruptcy

Judge reached, would be better. But these personal views do not justify departure from the rule of law applicable to cases on review from Bankruptcy Courts.

New findings are not permitted to be made by a reviewing judge, particularly when based upon matter outside the record.

New inferences drawn from the record are not permitted to be made. The scope of review is not de novo.

The only question in this case is the state of mind of the attorneys with regard to their compensation.

There was substantial evidence to support the Bankruptcy Judge. It is he who had the only opportunity to review the demeanor of the witnesses. It is he to whom creditibility assessments are committed exclusively.

The Bankruptcy Judge viewed the

evidence as a whole, both pro and con, and answered the question whether or not these legal services were gratuitous.

The reviewing judge did not do so. His opinion selected only certain items for consideration, He considered other factors not in the record, and apparently considered items off record entirely.

While the evidence and witnesses in the actual record of this case, may allow two fact finders to reach two different findings, the evidence taken as a whole would support each fact finder's views. The reviewing judge is not empowered to adopt his own inferences different from those of the Bankruptcy Judge.

As the Supreme Court of the United States has remarked:

> ". . . the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial

judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. . . ."

Anderson, 470 U.S. at p. 575.

If the applicable record on review is viewed as a whole, the Bankruptcy Judge's ruling that fees were not intended to be donated to the Debtor is supported by the evidence. This is so, particularly in view of his opportunity to hear and see the witnesses, and also to weigh their credibility.

The Supreme Court has observed, in such cases, it is the trial judge's resolution of two conflicting versions which is controlling. That ruling will not be disturbed by a reviewing judge.

RELIEF SOUGHT

The appellant requests this court

reverse the reviewing court. Specifically, the Bankruptcy Judge's holding that these extensive legal services were not donated, was not clearly erroneous.

This court is requested to hold the Bankrukptcy Judge's finding affirmed.

STATEMENT OF RELATED CASES

There are no related cases.

Respectfully submitted,

CHARLES C. ERWIN
Attorney for Appellant

Number _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

IN RE: MARQUAM INVESTMENT CORPORATION,

Debtor,

SUZAN BREWER,

Plaintiff-appellee,

vs.

ERWIN & ERWIN, Professional Corporation,

Defendant-appellant.

CONSTITUTIONAL PROVISIONS,

STATUTES, AND RULES VERBATIM

Warde H. Erwin
Counsel of Record for Defendant-appellant
Address: Suite 100
2110 SW Jefferson Street
Portland, Oregon 97201
(503) 226-4525

Charles C. Erwin
Additional Counsel
Address: Suite 100
2110 SW Jefferson Street
Portland, Oregon 97201
(503) 226-4525

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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

When prosecution to be by presentment or indictment; double jeopardy; self-incrimination; due process; compensation for property taken for public use. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

OREGON REVISED STATUTES
(Professional Corporations)

"58.075 **Purposes for which professional corporation may be organized.** (1) A professional corporation may be organized to render one type professional service only and services ancillary thereto through its shareholders, directors, officers, employees, and agents

who are themselves duly licensed to render such service. Shareholders holding a majority of the shares and a majority of the directors of the corporation must be licensed to render the professional service in which the corporation is organized.

POWERS AND DUTIES

"58.155 **Method by which professional corporation to render services.** A professional corporation may render professional service only through individuals who are licensed within this state to render the professional service for which the corporation is organized and who are its shareholders, directors, officers, employees or agents. (1969 c. 592 §10)"

FEDERAL RULES OF APPELLATE PROCEDURE

FRAP 38. **DAMAGES FOR DELAY**

"If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

BANKRUPTCY RULES - APPEALS

"**Rule 8013. Disposal of Appeal; Weight According Bankruptcy Judge's Findings of Fact.**

"On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a

bankruptcy court's judgment, order,or decree or remand with instructions for further proceedings. **Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."** (Emphasis supplied)

FEDERAL STATUTE

11 U.S.C., 502 provides:

"(a) A claim or interest, proof of which is filed under Section 501 of this Title (11 USC §501) is deemed allowed unless the party in interest . . . objects."

"(b) . . . if such an objection is made, the court after notice and hearing shall determine the amount of such claim as date of the petition and shall allow such claim in lawful currency of the United States in such amount except to the extent that . . ."

* * *

"(4) . . . if such claim is for 'services' of an 'insider' or 'attorney of the debtor,' such claim exceeds the reasonable value of services."

FRAP 35. DETERMINATION OF CAUSES BY THE COURT IN BANC

(a) When Hearing or Rehearing In Banc Will be Ordered. A majority of

the the circuit judges who are in Regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) **Suggestion of a Party for Hearing or Rehearing in Banc.** A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party."

CIRCUIT COURT ADVISORY COMMITTEE NOTES TO RULES 35-1 to 35-3

"(4) **Suggestions for Rehearing En Banc.** When the clerk receives a timely petition for rehearing which also suggests a rehearing en banc, copies are sent to all active judges. If the panel grants a rehearing, it so advises the other members of

the Court, and the suggestion for rehearing en banc is deemed rejected without prejudice to its renewal after the panel completes action on the rehearing Cases are rarely reheard en banc.

"If no suggestion for rehearing en banc has been submitted and the panel votes to deny rehearing, an order to that effect will be prepared and filed. If a suggestion for rehearing en banc has been made, the panel will first make known to the other members of the Court its decision to deny rehearing and its recommendation with regard to the en banc suggestion. Upon receiving such notice, any judge in active service may request en banc consideration whereupon on a vote will be taken. If no judge requests or gives notice of an intention to request en banc consideration within 21 days of the panel's recommendation, the panel will enter an order denying rehearing and rejecting the suggestion for rehearing en banc.

"Any judge who is not recused or disqualified and who entered upon active service before the call for a vote is eligible to vote. A judge who takes senior status after a call for a vote may not participate in the en banc rehearing or be eligible to vote on subsequent questions relating to the case. This rule is subject to two exceptions (1) a judge who takes senior status during the pendency of an en banc case for which the judge

has already been chosen as a member of the panel may continue to serve on that panel until the case is finally disposed of; and (2) a senior judge may elect to be eligible, in the same manner as an active judge, to be selected as a member of the en banc court when it reviews a decision of a panel of which the judge was a member.

"The En Banc Coordinator notifies the judges when voting is sufficiently complete to determine the result. If the recommendation or request fails of a majority, the En Banc Coordinator notifes the judges and the panel resumes . . . ."

FEDERAL RULES OF CIVIL PROCEDURE

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) **Clerical Mistakes.** Clerical mistakes in judgments,orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes, Inadvertence, Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** Upon motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsice or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. 1655, or to set aside

a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."